Filed 3/25/13 In re William H. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re WILLIAM H., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. SHANNON L., Defendant and Appellant.	F065411 (Super. Ct. No. JD125899) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Jon E. Stuebbe, Judge.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Theresa A. Goldner, County Counsel, and Kelli R. Falk, Deputy County Counsel, for Plaintiff and Respondent.

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Shannon L. (mother) appeals from the judgment terminating her parental rights to her son William, under Welfare and Institutions Code section 366.26,[1] and the court order denying her section 388 modification petition. She also contends that the provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C., § 1901 et seq.) were not complied with. We disagree with her contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of William's birth in November of 2010 in Kern County, he was premature and placed in intensive care. Shortly thereafter, he was transferred to UCLA Children's Hospital, due to an ongoing heart condition. Mother told a social worker shortly after William's birth that she was unable to provide for him.

January 31, 2011, Dependency Petition

In January of 2011, while still in the hospital, William was taken into protective custody by the Kern County Department of Human Services (the Department). The Department filed a section 300 petition, subdivisions (b) and (j), regarding the minor, alleging that mother had failed to demonstrate an ability to protect William from domestic violence or to provide a clean and safe home for him; that she had a history dating back to 2004 of failing to provide a safe home; that she failed previously to complete ordered classes; that William was medically fragile and mother did not have the capability of caring for him; and that she had failed to reunify with two other children.

February 1, 2011, Detention Hearing

Mother testified at the detention hearing that her husband, William H., could not be the father of William, that she was legally separated from him, and that she did not know who the father of the baby was. Mother declared that she had no known Indian ancestry. The juvenile court temporarily detained William and found that ICWA did not

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

apply. Mother was permitted to visit William consistent with the hospital visitation policy. William was released from the hospital three days later.

March 23, 2011, Jurisdiction Hearing

On March 23, 2011, the juvenile court conducted a jurisdiction hearing and found that William was a person described by section 300, subdivisions (b) and (j).

June 8, 2011, Contested Disposition Report and Hearing

The psychological evaluation of mother done in anticipation of the contested dispositional hearing reported that mother had joined the Army at age 19 and while there was "'[h]it by lightning, fractured the left side of [her] hip, and caught walking pneumonia … and almost died ….'" The report stated that mother was now homeless, slept under a bridge, showered every other day at her father's, and located and collected recycling for a living. According to mother, William's conception was the result of a rape.

The report further stated that five of William's older siblings lived with mother's mother, who had adopted two of the children and was legal guardian of the other three. Mother saw these children regularly on weekends. A sixth older sibling lived out of town with her father, and mother saw her once a month. Although mother stated that she did not trust the Department, she told the psychologist that she had attended all visits allowed with William, she had completed all of her previously ordered training and/or counseling, and she planned to look for a job and residence. Mother told the psychologist that she had never been involved in mental health treatment and had never taken mental health medications.[2]

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[2] In a psychological evaluation conducted in connection with a 2008 dependency matter, another psychologist reported a diagnosis of bipolar disorder. At that time, mother reported a history of mental health services throughout her life and attempted suicide in 1994, but that she was not involved in mental health services nor was she taking psychotropic medication at that time. According to mother, she was able to control her symptoms by "going to church and dancing."

The psychologist found mother credible and concluded that she was suffering from post-traumatic stress disorder, causing her to be angry, fearful and paranoid of the Department. The psychologist recommended that the Department assist mother in obtaining a variety of services and that she be given the opportunity to participate in reunification.

On June 8, 2011, the Department reported that mother had failed to complete reunification services in the past, continued to resist mental health treatment, and in the six months since William was detained had made no progress toward obtaining housing. Mother also continued to have contact with her husband, with whom she had a history of domestic violence. The Department recommended that reunification services with William be denied. William, who had been diagnosed with a congenital heart defect at birth, which was corrected with surgery, continued to have trachealmalasia and required a feeding tube. He was now living in a foster home appropriate for his medical conditions.

At the contested disposition hearing, held June 8, 2011, the juvenile court found William was suitably placed out of mother's home and reunification services were not offered, pursuant to section 361.5, subdivision (b)(10) and (11).[3] Visitation was reduced to one hour a month, and a section 366.26 termination hearing set. The county adoption agency was ordered to prepare an assessment of the child.

December 6, 2011, Section 366.26 Termination Reports and Hearing

On December 6, 2011, the Department reported that the adoption social worker was actively "in the process of locating a prospective adoptive placement" for William.

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[3] Section 361.5, subdivision (b)(10) provides that reunification services need not be provided to a parent if the juvenile court has ordered termination of reunification services for a sibling or half sibling of the child. Section 361.5, subdivision (b)(11) provides that reunification services need not be provided to a parent if the parental rights over a sibling or half sibling of the child have been permanently severed.

Although a potential prospective adoptive parent had been located out of the county, mother objected.

A supplemental department report stated that William's original foster caretaker had undergone special training to learn how to administer feedings to William, as he did not take any food or liquid by mouth. Although William was described as a happy baby, the level of care required to meet his medical issues was high. If allowed to cry for any length of time, he developed shortness of breath and turned blue due to lack of oxygen. The temperature in the home had to be regulated to maintain his health, and he received medication through a nebulizer apparatus to help him breathe. William required almost constant monitoring to insure that he was able to breathe. He was connected to a continuous feeding tube 22 out of 24 hours a day.

The Department originally recommended a plan of legal guardianship for William because his first caregiver was not committed to adoption. The Department was then in the process of assessing a new prospective adoptive mother who had a professional medical background and was dedicated to providing permanency for medically fragile foster children through a permanent plan of adoption. The Department anticipated a change of placement soon.

According to the social worker, between February and June of 2011, mother attended only eight of the 19 scheduled visits with William. When she did visit, her visits were appropriate and William responded positively to her.

At the termination hearing on December 6, 2011, the juvenile court ordered that all prior orders remain in full force and effect. Termination of parental rights in favor of adoption was identified as a permanent placement goal, but not ordered at the time. The Department was ordered to make efforts to locate an adoptive home within the next 180 days. Placement out of the county was authorized. A continued section 366.26 hearing was set for June 4, 2012.

William's Father

On March 8, 2012, the juvenile court declared William H., Sr., mother's husband, to be William's biological father and ordered visitation. On April 9, 2012, the juvenile court elevated William H. to presumed father status, but denied his request for reunification services under sections 361.5, subdivision (b)(10), (11), and (13)[4]. Father appealed the denial of reunification services, but the appeal was dismissed.

May 25, 2012, Section 388 Modification Petition

In May of 2012, mother gave birth to her eighth child and arranged for a private adoption. Later that month, mother filed a section 388 petition requesting the return of William to her home or, in the alternative, reunification services, to allow William to develop a relationship with his sibling and reunite with mother. By this time, mother claimed to have completed anger management, parenting and neglect classes, "Learning to Protect" training, had obtained counseling, was attending a depression support group, and visited William regularly.

July 24, 2012, Combined Section 388 Modification and Continued Section 366.26 Termination Report and Hearing

In anticipation of the continued section 366.26 hearing, the Department submitted an updated adoption assessment, addressing both William and the prospective adoptive parent's ability to meet William's needs. The prospective adoptive mother, with whom William had resided since December 7, 2011, was 43 years old, divorced, and had worked as a pediatric registered nurse since 1993. She was currently an in-home care provider. She was in good health and had an annual income of $100,000. She had two biological sons, ages 11 and 13, and an adopted son, age 12, who had cystic fibrosis. She has no criminal history. She had advocated on William's behalf to increase the

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4 See footnote 3. Section 361.5, subdivision (b)(13) provides that reunification services need not be provided if the parent has a history of drug or alcohol abuse and has resisted prior court ordered treatment.

developmental services provided him by the local regional center. The prospective adoptive mother was meeting all of William's needs, taking him to all appointments and following doctor recommendations. She showed warmth and affection toward William, and he appeared to be content and comfortable while being held by her. She also intended to allow post-adoption contact with mother as long as it did not pose a risk to William's well-being.

Mother was reported to be participating in mental health services and was under a doctor's care; she was drug testing negative; she completed anger management training and other ordered classes; she had attended all visits with William during the previous six months and they had gone well, although William did not appear to relate to his mother as his primary caretaker; and she was cleaning homes and recycling scrap metal and seeking employment. Mother was on medication prescribed by a psychiatrist in June of 2012, and she had scheduled an appointment with an independent therapist. Mother's divorce from William's father became final in May of 2012, and she had a restraining order against him.

The Department reported that William would be requiring a cardiac catheterization in the future and possible balloon or stent angioplasty. He had vocal paralysis and upper airway congestion and needed to use a nebulizer for coughing and shortness of breath. He was receiving occupational therapy and was assigned a feeding team to promote assistance with the transition to taking food by mouth. He had significantly delayed cognitive development skills, gross motor skills, and receptive language and expressive language skills.

In a supplemental report filed on July 24, 2012, the Department reported that William was now eating some foods, could pull himself up to a standing position, and could pick up toys and place them in a box. There was a concern that he had a hearing impairment. His cardiologist was holding off on heart surgery to place a stint as long as possible. Visits between mother and William continued to go well. On July 6, 2012,

mother reported to the social worker that the medications she was prescribed by the psychiatrist made her feel somewhat "off," and she was not going to take one of the prescribed medications because she had concerns about it.

The Department reported that there had been three child protective service referrals involving the prospective adoptive parent: on January 15, 2008, March 5, 2010, and May 31, 2012. Investigations found the allegations of each to be unfounded, and the children found to be not at risk.

At the July 24, 2012, combined section 388 modification and section 366.26 termination hearing, mother testified that she had completed anger management, parenting and neglect and learning to protect training, she had completed required counseling, was seeing a psychiatrist, taking prescribed medication for depression, and attending a depression suicide support group. She realized that what she had done in the past was wrong, but felt that she was now mentally and physically able to care for William. Mother testified that she was aware of the additional attention William required due to his physical disabilities, and she had transportation to get William to his medical appointments. She acknowledged her past reluctance to work with the Department and was now availing herself of their services. Mother testified that it would be in William's best interest to be placed with her "because I'm his mother."

Mother's fiancé, whom she met in January of 2012, testified that he lived with mother and they were engaged. He was committed to helping care for William, although he had not been with mother at any of her visits with him. He had raised his own son through age 12. He was now sober, although he had committed arson while intoxicated more than nine years earlier. He had served a prison sentence for the arson and was compliant with parole and counseling orders.

The juvenile court denied the section 388 petition and then found, over mother's objection, that there was clear and convincing evidence that William was likely to be adopted and terminated mother's parental rights, pursuant to section 366.26.

DISCUSSION

I. TERMINATION OF PARENTAL RIGHTS

Mother argues that the juvenile court's adoptability finding was not supported by clear and convincing evidence. According to mother, William was improperly and improvidently deemed adoptable in light of the three child protective service referrals made against the prospective adoptive mother. We disagree and affirm.

A section 366.26 hearing proceeds on the premise that the efforts to reunify the parent and child are over, "and the focus of the hearing is on the long-term plan for care and custody." (*In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1808.) "The court must proceed by section 366.26, subdivision (c)(1) and terminate parental rights if clear and convincing evidence shows that it is likely that the minor will be adopted." (*Ibid.*) "The adoptability issue at a section 366.26 hearing focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt. [Citation.] It is not necessary that the child already be in a potential adoptive home or that there be a proposed adoptive parent '"waiting in the wings."' [Citation.]" (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1311.)

A child is either "generally" or "specifically" adoptable. A child is generally adoptable if the child's traits, e.g., age, physical condition, mental state, and other relevant factors do not make it difficult to find a person who will adopt him or her. On the other hand, if a child is deemed adoptable only because of the caregiver's willingness to adopt, the child is specifically adoptable. (See *In re R.C.* (2008) 169 Cal.App.4th 486, 492-494; *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.)

If a child is generally adoptable, "the suitability or availability of the caregiver to adopt is not a relevant inquiry. [Citations.] Rather, a caregiver's willingness to adopt serves as further evidence the minor is likely to be adopted within a reasonable time either by the caregiver '*or by some other family*.' [Citation.]" (*In re R.C., supra,* 169

Cal.App.4th at pp. 493-494, fn. omitted; see also *In re Carl R., supra,* 128 Cal.App.4th at p. 1061.)

Where, as here, the child is specifically adoptable because of a particular family's willingness to adopt the child, the trial court must determine whether there is a legal impediment to adoption. (*In re Carl R., supra,* 128 Cal.App.4th at p. 1061.) *In re Carl R.* found that a "child who is specifically adoptable and who will need total care for life is at high risk of becoming a legal orphan if parental rights are terminated and the prospective adoptive family is later determined to be unsuitable." (*Id.* at p. 1062, fn. omitted.) Thus, the court must consider more than whether there is a legal impediment to adoption; the court must consider whether the prospective adoptive parents can meet the child's needs. (*Ibid.*)

We apply the substantial evidence test to the dependency court's finding that the minor is adoptable. Our task is to determine whether there is substantial evidence from which a reasonable trier of fact could find, by clear and convincing evidence, that the minor is adoptable. "The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order." (*In re R.C., supra,* 169 Cal.App.4th at p. 491.)

We disagree with mother's assertion that there was insufficient evidence that William was specifically adoptable by his current caregiver. The prospective adoptive mother, with whom William had resided for seven months, was a 43-year-old former pediatric nurse who now worked as an in-home care provider. She was in good health; had an annual income of $100,000; cared for her two biological sons, ages 11 and 13, and an adopted son, age 12, who had cystic fibrosis. The prospective mother was meeting all of William's special medical needs and he was making progress. She was taking him to all appointments, following doctor's recommendations, and advocating on William's behalf to increase his developmental services. The prospective adoptive mother showed William warmth and affection, and he appeared content and comfortable with her.

Mother makes much of the three child protective service referrals on the prospective adoptive mother. But all three referrals, which took place in January 2008, March 2010,[5] and May 2012, were investigated and determined to be unfounded and the children found not to be at risk. We will not speculate, as mother does, that since the allegations in the referrals involved the prospective adoptive mother's adopted son, mother might also have difficulty with William as he gets older.

We find that the juvenile court's finding that there was clear and convincing evidence that William was likely to be adopted was supported by substantial evidence, and we reject mother's claim to the contrary.

II. DENIAL OF MODIFICATION PETITION

Mother contends that the juvenile court abused its discretion in denying her section 388 petition requesting reunification services and placement of William with her. We disagree.

A parent may petition the juvenile court to change, modify, or set aside any previous order made in the dependency proceeding based on changed circumstances. (§ 388, subd. (a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 305.) But, "[i]t is not enough for a parent to show *just* a genuine change of circumstances under the statute." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) The parent must show that the undoing of the prior order would be in the best interests of the child at the time the request is made. (*Ibid.*; see § 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317-318.)

A juvenile court's denial of a section 388 petition is reviewed under an abuse of discretion standard. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.) """The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing

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[5] Mother mistakenly claims this referral was made in March of 2012.

court has no authority to substitute its decision for that of the trial court.'" [Citations.]" (*Id.* at pp. 318-319.)

Mother testified at the July 24, 2012, section 388 hearing that she had completed anger management, parenting, neglect and learning to protect training, and she was now taking responsibility for her past actions. But, as the Department noted, she had only begun to address her mental health issues, having attended just one documented therapy session at that point. And while she had been prescribed and was taking psychotropic medication for one month prior to the hearing, she expressed concerns about one drug and contemplated stopping it. Mother was now living with a boyfriend, a recovering alcoholic with a criminal history. Although he claimed to want to help mother raise William, he had never met him. At this point, William was 20 months old. He had never lived with mother, mother had never provided care for him outside of the ordered supervised monthly visits, and she had never attended any of his doctor's appointments.

The prospective adoptive mother, with whom William had resided for over seven months, had shown her commitment to William and her ability to meet William's needs. William was doing well in the caregiver's home. In fact, mother had told the social worker after William had been in the prospective adoptive mother's home for six months that the prospective adoptive mother was "'good with William'" and that "'she could take better care of him than I would.'" (Italics omitted.)

In denying mother's section 388 petition, the juvenile court stated that, although mother "is genuine in her efforts and has made some steps in the right direction," those steps "have not added up to accomplishing changed circumstances," and it would not be in the best interest of the child to be with mother.

While mother demonstrated her circumstances were changing, the question was whether those changes were significant to demonstrate that removing William from a stable placement and giving mother time in which to reunify with William would be in William's best interest. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.) We agree

with the juvenile court that mother failed to demonstrate that William's best interest would be served by the requested changes. We thus find no abuse of discretion in denying mother's section 388 petition.

III. ICWA COMPLIANCE

Mother contends finally that ICWA was violated because no ICWA inquiry was made as to William H. after he was elevated to presumed status. The Department contends that it complied with ICWA's inquiry requirements as to mother and that no notice was required, but concedes that, as to father, the inquiry requirements of ICWA were not met. Nevertheless, the Department argues that the error was harmless because father did not claim Indian heritage in the juvenile court, he did not claim such on appeal, and that the finding that ICWA did not apply to father had previously been made in father's other dependency cases. We agree that, to the extent the juvenile court did not comply with ICWA inquiry requirements as to father, any such error was harmless.

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. § 1901 et seq.; *In re Holly B.* (2009) 172 Cal.App.4th 1261, 1266.) If there is reason to believe a child who is the subject of a dependency proceeding is an Indian child, ICWA requires that the child's Indian tribe be notified of the proceeding and its right to intervene. (25 U.S.C. § 1912(a); § 224.3, subd. (b).) A social worker who knows or has reason to know the child is Indian "is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather information" required to be provided in the notice. (§ 224.3, subd. (c).)

Mother claims ICWA was violated because no ICWA inquiry was made as to William H. after he was elevated to presumed father status. While it is true that an inquiry was not made on April 9, 2012, the one court appearance William H. attended

after establishing his paternity, the juvenile court had before it information that father did not have Indian heritage. The Department report prepared in anticipation of mother's jurisdiction hearing March 23, 2011, stated that, in a previous dependency case involving mother and William's daughter Sylvia, the juvenile court found that ICWA did not apply. At the jurisdiction hearing, the juvenile court took judicial notice of the case files involving five of William H.'s other children, including Sylvia (case No. JD116309). In addition, in the Department report filed in anticipation of the July 24, 2012, section 366.26 termination hearing, the social worker stated that, according to a health and family questionnaire sent to William H. on July 12, 2011, he had stated that he had no known Native American heritage.

These facts and circumstances establish, to the extent, if any, that the inquiries made were inadequate, any error was harmless. (*In re H.B.* (2008) 161 Cal.App.4th 115, 122; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431.)

DISPOSITION

The judgment is affirmed.

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Franson, J.

WE CONCUR:

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Levy, Acting P.J.

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Gomes, J.